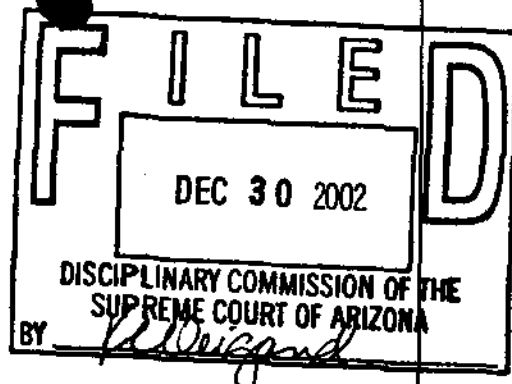


1 James D. Lee, Bar No. 011586
2 Senior Bar Counsel
3 State Bar of Arizona
4 111 West Monroe, Suite 1800
5 Phoenix, Arizona 85003-1742
6 Telephone (602) 340-7247



7 **BEFORE THE DISCIPLINARY COMMISSION**
8 **OF THE SUPREME COURT OF ARIZONA**

9 IN THE MATTER OF A MEMBER) No. 00-2172
10 OF THE STATE BAR OF ARIZONA,)
11 HARRY P. FRIEDLANDER,) TENDER OF ADMISSIONS AND
12 Bar No. 005244) AGREEMENT FOR DISCIPLINE
13 Respondent.) BY CONSENT

14
15 This agreement is entered into between the State Bar of Arizona, which is
16 represented by undersigned bar counsel, and respondent, who is not represented
17 by counsel. It is submitted pursuant to Rule 56(a), Ariz.R.S.Ct., and the
18 guidelines for discipline by consent issued by the Disciplinary Commission of
19 the Supreme Court of Arizona. Respondent conditionally admits he engaged in
20 conduct that violated ER 1.15(a), Rule 43(a) & (d), Ariz.R.S.Ct. (Guidelines 1.a.,
21 1.c., 1.d., 1.e., 2.c. and 2.e.), and Rule 44(b)3, Ariz.R.S.Ct., as more fully set
22 forth below.
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24
25

1 Subject to review and acceptance by the Disciplinary Commission and the
2 Supreme Court of Arizona, respondent agrees to accept imposition of censure,
3 one (1) year of probation (including participation in fee arbitration, if
4 appropriate, and the State Bar's Law Office Management Assistance Program
5 (LOMAP), as set forth more specifically below), and payment of the costs and
6 expenses of the disciplinary proceedings. Restitution, if appropriate, will be
7 addressed through the fee arbitration component of probation.
8
9

10 FACTS

11 GENERAL ALLEGATIONS

12 1. At all times relevant hereto, respondent was an attorney licensed to
13 practice law in the State of Arizona, having been admitted to practice law in
14 Arizona on April 22, 1978. In addition to respondent's admission in Arizona, he
15 was admitted to practice law in Illinois in 1974, and in Virginia and the District
16 of Columbia in 1962.
17

18 COUNT ONE (File No. 00-2172)

19
20 2. Sylvia Cannon ("Cannon"), acting *pro per*, filed a lawsuit against
21 Cigna Healthcare of Arizona on or about December 7, 1998 ("the lawsuit").

22 3. Cannon retained respondent on or about May 18, 1999, to represent her
23 in the lawsuit.
24
25

1 4. Cannon made the following payments to respondent for fees and costs:
2 \$5,200.00 on May 18, 1999; \$500.00 on July 26, 1999; \$2,000.00 on September
3 3, 1999; \$2,000.00 on November 17, 1999 (for costs associated with deposing an
4 expert witness); and \$3,000.00 on March 21, 2000 (for costs associated with the
5 expert witness' testimony at an arbitration hearing that was scheduled for June
6 20, 2000). Cannon's payment of \$2,000.00 on November 17, 1999, was made
7 with check #2463. Cannon's payment of \$3,000.00 on March 21, 2000, was
8 made with check #2580.
9

11 5. Respondent represented Cannon at an arbitration hearing, and on or
12 about September 27, 2000, obtained an award in Cannon's favor in the amount of
13 \$4,049.23.
14

15 6. Although there is disagreement about how the representation ended,¹ a
16 Maricopa County Superior Court judge permitted respondent to withdraw as
17 Cannon's counsel on or about October 25, 2000.
18

19 7. Respondent did not depose the expert witness or call him to testify at
20 the arbitration hearing because he believed his testimony would not be favorable
21 to Cannon. Despite that fact, respondent continued to hold the funds Cannon had
22 paid him for those purposes.
23

24
25 ¹ Respondent asserts that Cannon discharged him as her counsel on or about
October 4, 2000, but Cannon asserts she never terminated respondent's
representation of her.

1 8. At some point following the arbitration hearing, Cannon retained the
2 services of attorney Arthur McBrayer ("McBrayer") to communicate with
3 respondent and recover any unused funds that respondent should have returned to
4 her. On or about October 12, 2000, respondent informed McBrayer that he
5 believed he still had at least \$6,000.00 of unused funds belonging to Cannon in
6 his trust account.
7

8 9. On or about October 17, 2000, respondent provided an accounting and
9 a \$5,769.00 trust account refund check (#2610) to Cannon. Cannon deposited or
10 cashed that check on or about October 23, 2000.
11

12 10. Respondent failed to inform Cannon that a hearing had been re-
13 scheduled, causing her to make an unproductive trip into Phoenix from
14 Wickenburg, Arizona.
15

16 11. Due to the fact that respondent never deposed an expert witness on
17 Cannon's behalf, he should have had at least \$2,769.00² in his trust account
18 between November 17, 1999 (the date \$2,000.00 was deposited into his trust
19 account by Cannon), and March 22, 2000 (the day prior to respondent's deposit
20
21
22

23 ² The \$2,769.00 amount is based on respondent's eventual refund to Cannon. At
24 the very least, the amount respondent should have had in his trust account was
25 \$2,000.00, which was the amount Cannon had paid respondent to depose an
expert witness, but which did not occur.

1 of \$3,000.00 from Cannon), and at least \$5,769.00³ in his trust account between
2 March 23, 2000, and October 17, 2000.

3 12. On or about October 13, 2000, Cannon requested her file from
4 respondent. Cannon asserted she received an incomplete file. According to
5 Cannon, respondent failed to return deposition transcripts of the following
6 individuals: Sylvia Cannon, Mary Alice Maxey, Yvonne Sposito and Dr. Kim.
7 Respondent, on the other hand, asserted he never received one or more of the
8 deposition transcripts, submitted one or more of the transcripts into evidence at
9 the arbitration hearing, and returned one or more of the transcripts to Cannon.
10

11 13. Respondent's written fee agreement with Cannon included a "non-
12 refundable, fully earned retainer" of \$5,000.00 that was to be credited toward any
13 contingency fee that might be earned as a result of a favorable judgment in the
14 lawsuit. The intended meaning of the fee agreement was not clear to Cannon,
15 who believed she would receive a partial refund of the \$5,000.00 fee if
16 respondent failed to obtain an award on her behalf of at least \$15,000.00.
17

18 14. Respondent failed to maintain trust account records that were current.
19 As a result, respondent was unable to determine the balance in his trust account
20

21
22
23 ³ The \$5,769.00 amount is based on respondent's eventual refund to Cannon. At
24 the very least, the amount respondent should have had in his trust account was
25 \$5,000.00, which was the total amount Cannon had paid respondent to depose an
expert witness and have him testify as such at an arbitration hearing, neither of
which occurred.

1 at any time or the identity of clients or third parties for whom he was required to
2 hold funds in trust.

3 15. Respondent's trust account records indicate a negative balance for
4 several clients. The negative balance in respondent's records resulted from some
5 incorrectly entered expenses (e.g., photocopying and long distance telephone
6 charges) into his billing program. Respondent's trust account records also
7 contained other errors that resulted from inaccurate or incorrect entries for
8 payments made or received.
9

10 16. Respondent's check register reflects deposits and check numbers that
11 were out of sequence for the date on which the activity allegedly took place.
12

13 17. Respondent transferred \$350.00 to his general account on or about
14 February 17, 2000, without using a pre-numbered check.
15

16 18. The balance in respondent's trust account varied during the period
17 between November 17, 1999 and October 17, 2000. Based upon respondent's
18 client ledger for Cannon, he should have had \$4,174.56 in his trust account on
19 Cannon's behalf between November 17, 1999 and December 19, 1999. The
20 balance in respondent's trust account was \$3,933.75 on November 17, 1999,⁴
21 \$3,188.75 between November 18, 1999 and November 21, 1999, and \$3,088.53
22
23

24 ⁴ The bank balances set forth in this paragraph reflect the balance in respondent's
25 trust account at the end of the business day, as reflected by monthly statements
received from the bank at which the trust account was located.

1 on November 22, 1999. The balance in respondent's trust account was in excess
2 of \$4,174.56 between November 23, 1999 and December 19, 1999.

3
4 19. Based upon respondent's client ledger for Cannon, he should have had
5 \$4,005.81 in his trust account on Cannon's behalf between December 20, 1999
6 and February 2, 2000. The balance in respondent's trust account was in excess
7 of \$4,005.81 between those dates.

8
9 20. Based upon respondent's client ledger for Cannon, he should have had
10 \$3,591.01 in his trust account on Cannon's behalf between February 3, 2000 and
11 March 22, 2000. The balance in respondent's trust account was in excess of
12 \$3,591.01 between those dates.

13
14 21. Based upon respondent's client ledger for Cannon, he should have had
15 \$6,591.01 in his trust account on Cannon's behalf between March 23, 2000 and
16 May 2, 2000. The balance in respondent's trust account was \$2,574.63 on April
17 17 & 18, 2000, \$5,457.63 between April 19, 2000 and April 23, 2000, \$6,007.63
18 on April 24, 2000, \$5,727.63 on April 25, \$4,978.32 on April 26, 2000; and
19 \$4,528.32 on April 28, 2000. The balance in respondent's trust account was in
20 excess of \$6,591.01 between April 29, 2000 and May 2, 2000.

21
22 22. Based upon respondent's client ledger for Cannon, he should have had
23 \$6,586.49 in his trust account on Cannon's behalf between May 3, 2000 and June
24 19, 2000. The balance in respondent's trust account was \$2,238.14 on May 3 &
25

1 4, 2000, and \$5,238.14 between May 5, 2000 and May 8, 2000. The balance in
2 respondent's trust account was in excess of \$6,586.49 between May 9, 2000 and
3 June 19, 2000.
4

5 23. Based upon respondent's client ledger for Cannon, he should have had
6 \$6,336.49 in his trust account on Cannon's behalf between June 20, 2000 and
7 July 19, 2000. The balance in respondent's trust account was in excess of
8 \$6,336.49 between June 20, 2000 and July 2, 2000. The balance in respondent's
9 trust account was \$5,942.76 between July 3, 2000 and July 5, 2000. The balance
10 in respondent's trust account was in excess of \$6,336.49 between July 6, 2000
11 and July 19, 2000.
12

13 24. Based upon respondent's client ledger for Cannon, he should have had
14 \$6,318.49 in his trust account on Cannon's behalf between July 20, 2000 and
15 July 27, 2000. The balance in respondent's trust account was in excess of
16 \$6,318.49 between July 20, 2000 and July 27, 2000.
17

18 25. Based upon respondent's client ledger for Cannon, he should have had
19 \$6,018.49 in his trust account on Cannon's behalf between July 28, 2000 and
20 October 22, 2000. The balance in respondent's trust account was in excess of
21 \$6,018.49 between July 28, 2000 and August 8, 2000. The balance in
22 respondent's trust account was \$5,380.08 between August 9, 2000 and August
23 13, 2000, \$5,563.42 on August 14, 2000, \$4,463.42 on August 15, 2000, and
24
25

1 \$3,934.67 on August 16, 2000. The balance in respondent's trust account was in
2 excess of \$6,018.49 between August 17, 2000 and August 20, 2000. The balance
3 in respondent's trust account was \$5,999.08 on August 21, 2000. The balance in
4 respondent's trust account was in excess of \$6,018.49 between August 22, 2000
5 and August 27, 2000. The balance in respondent's trust account was \$4,312.08
6 on August 28, 2000, \$4,032.08 on August 29, 2000, \$3,975.57 on August 30,
7 2000, and \$4,339.27 between August 31, 2000 and September 2, 2000. The
8 balance in respondent's trust account was in excess of \$6,018.49 between
9 September 3, 2000 and September 19, 2000. The balance in respondent's trust
10 account was \$2,014.18 between September 20, 2000 and September 21, 2000,
11 \$1,952.78 between September 22, 2000 and September 25, 2000, \$1,802.78
12 between September 26, 2000 and September 28, 2000, and \$4,702.78 on
13 September 29, 2000. The balance in respondent's trust account was in excess of
14 \$6,018.49 between September 29, 2000 and October 2, 2000. The balance in
15 respondent's trust account was \$5,847.78 between October 3, 2000 and October
16 4, 2000, \$5,786.78 on October 5, 2000, and \$5,256.20 on October 6, 2000. The
17 balance in respondent's trust account was in excess of \$6,018.49 between
18 October 7, 2000 and October 17, 2000.
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1 26. Respondent's failure to maintain sufficient funds in his trust account
2 was a result of his failure to review individual client ledgers to determine the
3 funds he was required to hold in trust.
4

5 27. Respondent's conduct, as set forth above, violated the Rules of
6 Professional Conduct and the Rules of the Supreme Court (including the Trust
7 Account Guidelines promulgated pursuant to Supreme Court Rule 43(d)), as
8 follows: (a) respondent failed to hold property of clients or third persons
9 associated with his representation of one or more clients separate and apart from
10 his personal funds, business funds and/or funds not associated with the
11 representation of a client (i.e., respondent failed to hold in trust all the funds he
12 was required by the rules to hold in trust); (b) respondent failed to keep complete
13 records⁵ of the funds that were placed into his client trust account; (c) respondent
14 failed to maintain complete trust account records⁶ of the handling, maintenance
15 and disposition of all client funds that came into his possession at any time; (d)
16 respondent failed to exercise due professional care in the performance of his
17 duties under the Trust Account Guidelines promulgated pursuant to Rule 43(d),
18 Ariz.R.S.Ct.; (e) respondent failed to have and/or use internal controls in his
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23
24 ⁵ For purposes of this agreement, the State Bar and respondent assert that "complete records"
25 includes accurate records.

⁶ See note 5, *supra*.

1 office that were adequate under the circumstances to safeguard funds or property
2 held in trust; (f) respondent failed to promptly and completely record⁷ all client
3 trust account transactions; (g) respondent failed to create and/or maintain, on a
4 current basis, records complying with ER 1.15 and the Trust Account Guidelines
5 promulgated pursuant to Rule 43(d), Ariz.R.S.Ct.; (h) respondent failed to make
6 all trust account disbursements by pre-numbered check; and (i) respondent failed
7 to perform a monthly reconciliation of his trust account records (including his
8 general register or check register, and individual client ledgers) and trust account
9 bank statements.

12 28. Respondent's conduct, as set forth above, violated Rule 42,
13 Ariz.R.S.Ct., specifically ER 1.15(a), Rule 43(a) & (d), Ariz.R.S.Ct. (Guidelines
14 1.a., 1.c., 1.d., 1.e., 2.c. and 2.e.), and Rule 44(b)3, Ariz.R.S.Ct.

16 **COUNT TWO (Prior Discipline)**

17 Respondent has previously been sanctioned for violations of the Rules of
18 Professional Conduct. Specifically, in file number 86-1402, respondent received
19 an informal reprimand by order signed June 23, 1992 (but filed June 24, 1992),
20 for violation of ER 1.4; and in file numbers 90-1927 and 90-1639, respondent
21 received an informal reprimand by order signed November 8, 1993 (but filed
22 November 10, 1993), for violation of ER 1.8(a).

25 ⁷ See note 5, *supra*.

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ER 1.15(a) – 1 violation;

Rule 43(a), Ariz.R.S.Ct. – 1 violation;

Rule 43(d) (Guidelines 1.a., 1.c., 1.d., 1.e., 2.c., and 2.e.) – 1 violation;

Rule 44(b)3, Ariz.R.S.Ct. – 1 violation.

Respondent and the State Bar agree that based upon the conditional admissions contained herein, the following disciplinary sanctions will be imposed:

- The terms of probation will be as follows:
- a. Respondent will, within thirty (30) days of the issuance of a judgment and order by the Supreme Court of Arizona, contact the director of the Law Office Management Assistance

1 Program (LOMAP) at the State Bar of Arizona to schedule a
2 trust account review and an audit of his communication
3 procedures and policies.⁸ The LOMAP director or her
4 designee will complete a review of respondent's trust account
5 and communication procedures and policies no later than
6 ninety (90) days after issuance of a judgment and order by the
7 Supreme Court of Arizona. Following that review, respondent
8 agrees to comply with any and all recommendations of the
9 LOMAP director or her designee and enter into a
10 Memorandum of Understanding, which will include all
11 recommendations made by the director or her designee, which
12 may include but not be limited to: monthly or quarterly
13 reports; periodic reviews by, or meetings with, the director or
14 her designee; use of a practice monitor; and attendance at the
15 Trust Account Ethics Enhancement Program;

- 16
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19
20 b. Respondent will participate in fee arbitration with Sylvia
21 Cannon through the State Bar of Arizona Fee Arbitration
22

23 ⁸ Although respondent is not conditionally admitting to a violation of ER 1.4, he
24 is aware that Cannon raised several concerns regarding his communication with
25 her. Despite the lack of a conditional admission to a violation of ER 1.4,
respondent is willing, as part of the resolution of this case, to be bound by a term
of probation that will address his communication procedures and policies.

1 Program (if she files a petition for fee arbitration within three
2 (3) months of the entry of the judgment and order by the
3 Supreme Court of Arizona in this matter and the Program has
4 jurisdiction);⁹
5

6 c. Respondent will pay all costs and expenses associated with his
7 participation in the LOMAP program.
8

9 3. Respondent will pay all costs and expenses incurred in the
10 disciplinary proceedings in this matter. Attached hereto is a
11 statement of costs and expenses incurred by the State Bar in this
12 disciplinary proceeding.
13

14 4. Restitution, if appropriate, will be addressed through the fee
15 arbitration component of probation or in the context of the lawsuit
16 that Cannon has filed against respondent.
17

18 5. In the event respondent fails to comply with any of the foregoing
19 terms, and information thereof is received by the State Bar, bar
20 counsel will file a Notice of Non-Compliance with the hearing
21
22
23

24 ⁹ The State Bar and respondent realize that the Fee Arbitration Program may not have
25 jurisdiction due to a lawsuit that Cannon has filed against respondent. If any fee dispute has
been, is or will be addressed in the context of that lawsuit, restitution is not an issue in this
discipline proceeding.

1 officer previously assigned to this matter.¹⁰ The hearing officer will
2 conduct a hearing at the earliest practical date, but in no event later
3 than thirty (30) days following receipt of said notice, to determine
4 whether one or more terms of probation have been breached and, if
5 so, to recommend an appropriate sanction. If the State Bar alleges
6 that respondent failed to comply with any of the foregoing terms of
7 probation, the burden of proof will be on the State Bar to prove non-
8 compliance by a preponderance of the evidence.
9

11 Bar counsel has spoken with Cannon, who believes respondent should be
12 disbarred or suspended for a period of at least one year. Cannon would also like
13 additional funds and file documents and materials to be provided to her. This
14 consent agreement does not require compliance with those requests, in part
15 because the State Bar believes it is unable to prove violation of the ethical rules
16 related to those requests.
17
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22
23 ¹⁰ Although Rule 52(a)6.C., Ariz.R.S.Ct., states that the report shall be to the
24 "imposing entity," the Arizona Supreme Court and this Commission have
25 previously ordered that such report be filed with the previously assigned hearing
officer. See, e.g., *Matter of McAlister*, SB-02-0123-D (Disc. Comm. Nos. 00-
1720 & 01-0464) (2002).

1 Respondent conditionally admits he engaged in the conduct set forth
2 above, and the rule violations indicated, in exchange for the form of discipline set
3 forth above.
4

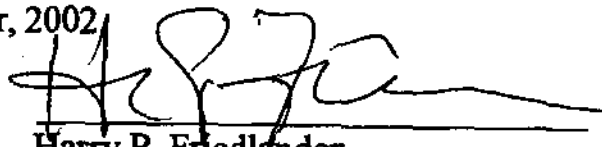
5 Respondent, by entering into this agreement, waives his right to a formal
6 disciplinary hearing that he would otherwise be entitled to pursuant to Rule
7 53(c)(6), Ariz.R.S.Ct., and the right to testify and present witnesses on his behalf
8 at a hearing. Respondent further waives all motions, defenses, objections or
9 requests that he has made or raised, or could assert hereafter, if the conditional
10 admissions and stated forms of discipline are approved. Respondent has chosen
11 not to seek the assistance of counsel in these proceedings, but acknowledges that
12 he has read this agreement and received a copy of it. Respondent submits this
13 agreement with conditional admissions freely and voluntarily, and without
14 coercion or intimidation, and is aware of the Rules of the Supreme Court with
15 respect to discipline.
16
17
18

19 This tender of admissions and agreement for discipline by consent will be
20 submitted to the Disciplinary Commission for review and approval. Respondent
21 realizes that the Disciplinary Commission may request his presence at a hearing
22 for presentation of evidence and/or oral argument in support of this agreement.
23 Respondent further recognizes that the Disciplinary Commission may
24 recommend rejection of this agreement, and that the Arizona Supreme Court may
25


1 accept or reject the Commission's recommendation. Respondent further
2 understands that if this agreement is rejected at any time, his conditional
3 admissions are withdrawn.
4

5 This agreement, with conditional admissions, is submitted freely and
6 voluntarily and not under coercion or intimidation. I am aware of the Rules
7 of the Supreme Court with respect to discipline and reinstatement.

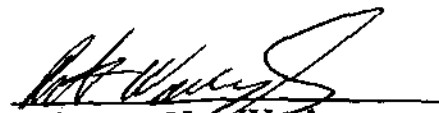
8 DATED this 27 day of December, 2002

9 
10 Harry P. Friedlander
11 Respondent

12
13 DATED this 27th day of December, 2002.

14 
15 James D. Lee
16 Senior Bar Counsel

17 Approved as to form and content:
18

19 
20 Robert B. Van Wyck
21 Chief Bar Counsel

22
23
24 Original filed with the Disciplinary Clerk
25 this 30th day of December, 2002.

1 Copies of the foregoing mailed
2 this 30th day of December, 2002, to:

3 Harry P. Friedlander
4 Gibson Matheson Lalliss & Friedlander
5 1837 South Mesa Drive, Suite C-100
6 Mesa, Arizona 85210-6219
Respondent

7 Copies of the foregoing
8 hand-delivered this 30th day of
December, 2002, to:

9 Lawyer Regulation Records Manager
10 State Bar of Arizona
11 111 W. Monroe, Suite 1800
Phoenix, Arizona 85003

12 by: Julia Hemm
13 JDL:es mn

FILED

JUL 02 2002

STATE BAR OF ARIZONA

by *Quinn Fair*

BEFORE THE PROBABLE CAUSE PANELIST

OF THE STATE BAR OF ARIZONA

IN THE MATTER OF A MEMBER
OF THE STATE BAR OF ARIZONA,

HARRY P. FRIEDLANDER,
Bar No 005244

Respondent.

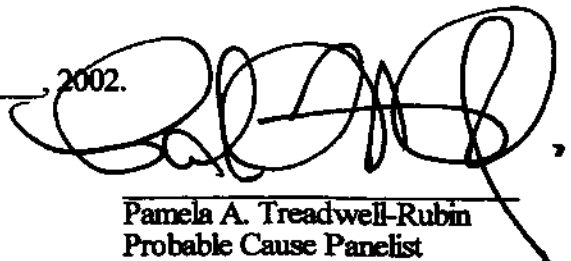
No. 00-2172

PROBABLE CAUSE ORDER

The Probable Cause Panelist of the State Bar, having reviewed this matter pursuant to Rule 53(b), Ariz.R.S.Ct., finds that probable cause exists to issue a complaint against respondent for violations of Rule 42, Ariz.R.S.Ct., including but not limited to ER 1.15(a) & (b), ER 1.16(d), Rule 43(a) & (d) (Guidelines 1.a., 1.c., 1.d., 1.e., 2.c. and 2.e.), and Rule 44(b)3 & 4, Ariz.R.S.Ct.

IT IS THEREFORE ORDERED that the State Bar prepare and file a complaint with the Disciplinary Clerk.

DATED this 21 day of June, 2002.

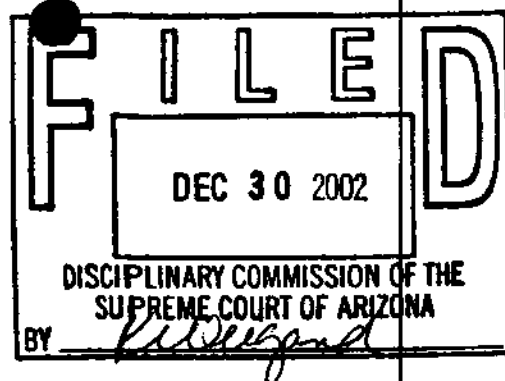

Pamela A. Treadwell-Rubin
Probable Cause Panelist
State Bar of Arizona

Copies mailed/hand-delivered this 10th day of July, 2002, to:

Harry P. Friedlander
Attorney at Law
1837 S. Mesa Drive, Suite C-100
Mesa, AZ 85210

by: *Cathy A. McPhee*
JDL/mn

1 James D. Lee, Bar No. 011586
2 Senior Bar Counsel
3 State Bar of Arizona
4 111 West Monroe, Suite 1800
5 Phoenix, Arizona 85003-1742
6 Telephone (602) 340-7247



7
8 **BEFORE THE DISCIPLINARY COMMISSION**
9 **OF THE SUPREME COURT OF ARIZONA**

10 IN THE MATTER OF A MEMBER) No. 00-2172
11 OF THE STATE BAR OF ARIZONA,)
12)
13 **HARRY P. FRIEDLANDER,**) **JOINT MEMORANDUM IN**
14 **No. 005244**) **SUPPORT OF AGREEMENT**
15) **FOR DISCIPLINE BY CONSENT**
16 **Respondent.**)
17)

18 The State Bar of Arizona, which is represented by undersigned bar counsel,
19 and respondent, who is not represented by counsel, hereby submit this Joint
20 Memorandum in support of the Tender of Admissions and Agreement for
21 Discipline by Consent filed contemporaneously herewith.

22 **CONDUCT**

23 As reflected in the Tender of Admissions and Agreement for Discipline by
24 Consent, respondent's misconduct involved violations of the Supreme Court Rules
25 and Trust Account Guidelines, all of which pertained to the operation of his trust
account. Respondent conditionally admits the facts as set forth in the Tender of
Admissions.

SANCTIONS

Respondent agrees to accept the following as the appropriate sanctions in this matter: censure, one (1) year of probation (including participation in fee arbitration, if appropriate, and the State Bar's Law Office Management Assistance Program (LOMAP)), and payment of the costs and expenses of the disciplinary proceedings. Restitution, if appropriate, will be addressed through the fee arbitration component of probation. The State Bar and respondent believe these sanctions are appropriate under the circumstances.

In determining the appropriate sanctions, the State Bar considered both the American Bar Association's *Standards for Imposing Lawyer Sanctions* (hereafter "Standards") and Arizona case law.

American Bar Association's Standards for Imposing Lawyer Sanctions

The A.B.A. *Standards for Imposing Lawyer Sanctions* provide guidance with respect to an appropriate sanction in this matter. The Supreme Court and the Disciplinary Commission are consistent in utilizing the Standards to determine appropriate sanctions for attorney discipline. *In re Kaplan*, 179 Ariz. 175, 877 P.2d 274 (1994).

Standard 4.12 states, "Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client." Standard 4.13 states, "Reprimand

1 [censure in Arizona] is generally appropriate when a lawyer is negligent in dealing
2 with client property and causes injury or potential injury to a client." Standard
3 4.14 states, "Admonition [informal reprimand in Arizona] is generally appropriate
4 when a lawyer is negligent in dealing with client property and causes little or no
5 actual or potential injury to a client."
6

7 The facts of this case implicate all three of the above Standards.
8
9 Respondent was negligent in failing to maintain complete trust account records.
10 Had he complied with the trust account rules and Guidelines, he would have
11 realized he was dealing improperly with client property (i.e., respondent "should
12 have known" that he was dealing improperly with client property). Finally,
13 respondent's non-compliance with the trust account rules and Guidelines subjected
14 his clients to potential harm. In this case, however, no client suffered actual harm
15 because respondent returned the unused funds to Sylvia Cannon ("Cannon")
16 shortly after his representation of her ended.
17
18

19 An analysis of the relevant aggravating and mitigating factors is also
20 necessary. A review of Standard 9.22 reveals that the following aggravating
21 factors are present:
22

23 1. Standard 9.22(a), prior disciplinary offenses. Respondent received an
24 informal reprimand in 1992 for violation of ER 1.4, and an informal reprimand in
25 1993 for violation of ER 1.8(a). Those prior sanctions should be given very little

1 weight because the prior sanctions were not based upon improper conduct
2 involving respondent's trust account and are remote in time from the misconduct
3 in the instant matter.
4

5 2. Standard 9.22(c), a pattern of misconduct. The pattern of misconduct is
6 based on the fact that for a period of several months the balance in respondent's
7 trust account was less than he was required to hold on Cannon's behalf. That
8 indicates that respondent failed to conduct a monthly reconciliation of his trust
9 account records and the trust account bank statements for a relatively extended
10 period of time.
11

12 3. Standard 9.22(d), multiple offenses. See discussion above regarding
13 Standard 9.22(c).
14

15 4. Standard 9.22(h), vulnerability of the victim.¹ Sylvia Cannon was
16 vulnerable to the extent that she had no control over respondent's handling of the
17 funds she had provided to him.
18

19 5. Standard 9.22(i), substantial experience in the practice of law.
20 Respondent was admitted to practice law in Arizona on April 22, 1978, but was
21 admitted in Illinois in 1974 and in Virginia and the District of Columbia in 1962.
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25 ¹ The Supreme Court of Arizona has stated that "[a] victim's vulnerability turn's
not on a person's educational background or work experience, but rather on the
situation." *In re Shannon*, 179 Ariz. 52, 69, 876 P.2d 548, ____ (1994).

1 A review of Standard 9.32 reveals that the following mitigating factors are
2 present:

3 1. Standard 9.32(b), absence of a dishonest or selfish motive. There is no
4 evidence that respondent knowingly or intentionally "misappropriated" Cannon's
5 funds; rather, respondent's "temporary misappropriation" of Cannon's funds was a
6 result of negligence.
7

8 2. Standard 9.32(d), timely good faith effort to make restitution or to rectify
9 the consequences of his misconduct. Respondent returned the unearned and
10 unused funds to Cannon on or about October 17, 2000 (which was one day before
11 the State Bar received the initial charges of misconduct from Cannon).
12

13 3. Standard 9.32(e), full and free disclosure to a disciplinary board or
14 cooperative attitude toward the proceedings. Respondent not only responded to
15 bar counsel's inquiries during the screening investigation, but also informed bar
16 counsel very early in the investigation that he wanted to resolve this case prior to
17 the filing of a formal complaint. In addition, respondent cooperated with bar
18 counsel in negotiating this consent agreement.
19

20 4. Standard 9.32(g), character or reputation. Respondent intends to file
21 letters with the Disciplinary Commission prior to oral argument regarding his
22 good character and reputation.
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1 5. Standard 9.32(l), remorse. Respondent regrets his failure to comply with
2 all the trust account rules and Guidelines, and is willing to incorporate procedures
3 that will ensure future compliance.
4

5 6. Standard 9.32(m), remoteness of the prior offenses. Respondent's prior
6 informal reprimands were imposed in 1992 and 1993.

7 Non-A.B.A. factors to consider in mitigation include the following: (1) the
8 prior informal reprimands were imposed for violations of ER 1.4 and ER 1.8(a),
9 both of which are unrelated to the violations in this matter; (2) respondent has
10 received a State Bar award for being among the top fifty *pro bono* lawyers in
11 Arizona; (3) respondent will soon receive the Family Law—Lawyer of the Year
12 award from the Volunteer Lawyers Program; (4) respondent has voluntarily
13 represented at least seven clients through the Volunteer Lawyers Program of the
14 State Bar; (5) respondent has chosen to provide *pro bono* services to a woman in
15 an effort to help her obtain a settlement in a case involving an automobile
16 repossession; (6) respondent started a "Law Help" program at his church for which
17 he receives no fee (respondent refers valid cases to other lawyers); (7) respondent
18 is the Arizona District Governor of the Sertoma Club, a service organization; (8)
19 respondent is a Eucharistic minister at his church; (9) respondent has had difficulty
20 finding competent secretarial assistance during the past two years (various
21 secretaries failed to follow respondent's instructions and failed to respond to
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1 clients, as directed); (10) respondent has recently reduced the number of active
2 clients he has at any one time and now limits the type of cases he will accept (e.g.,
3 respondent no longer accepts medical malpractice cases); (11) respondent has
4 promised bar counsel that he will now begin sending monthly status letters to his
5 clients, even if it is only to advise that there is nothing new to report; and (12)
6 respondent has improved his clients' ability to communicate with him by
7 telephone (e.g., respondent now has a cellular phone that he answers after regular
8 office hours and while he is away from his office; in divorce cases, respondent
9 provides his home telephone number to his clients; and respondent will soon begin
10 sending written confirmation of all telephone calls with clients).

11 Proportionality Analysis

12 The Arizona Supreme Court and the Disciplinary Commission have
13 previously addressed conduct similar in nature to that in the instant matter.

14 In *Matter of Niemeir*, SB-01-0194-D (2002), attorney Thomas Niemeir was
15 censured and placed on two years probation for making nineteen withdrawals of
16 unearned funds from his trust account, totaling \$20,609.00, over a nine and a half
17 month period. The Disciplinary Commission determined that suspension was the
18 presumptive sanction, but reduced the sanction to a censure after finding the
19 presence of seven ABA mitigating factors, but only two ABA aggravating factors.
20 See also *In re Van Baalen*, SB-01-0160-D (2001) (presumptive sanction of
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1 suspension in a trust account case was reduced to a censure, primarily as a result
2 of "substantial" mitigation).

3 Although the presumptive sanction in the instant matter may be suspension,
4 mitigating factors warrant the imposition of a censure and one year of probation.
5

6 In *Matter of Hall*, SB-02-0122-D (2002), attorney Dennis Hall received a
7 censure and one year probation for failing to adequately protect his clients' funds
8 and using one client's funds to make payments of costs for other clients, failing to
9 keep his personal or business funds separate from his clients' funds, failing to use
10 a pre-numbered check on every occasion, and failing to maintain adequate trust
11 account records. The Disciplinary Commission found the existence of six
12 mitigating factors and only one aggravating factor.
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15 In the instant case, respondent failed to adequately protect his client's funds,
16 failed to use a pre-numbered trust account check on very occasion, and failed to
17 adequately review his trust account records to determine that client funds were
18 being compromised.
19

20 A review of *In re Lancaster*, SB-01-0119-D (2001), is also useful. For a
21 period of five months, attorney Wendy Lancaster withdrew funds from her trust
22 account prior to earning those funds, disbursed trust account funds on behalf of
23 clients for whom she had no funds in trust, and failed to maintain accurate trust
24 account records. Lancaster received a censure and one-year probation. The only
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1 factor in aggravation was pattern of misconduct, while there were seven factors in
2 mitigation.

3 Respondent in the instant matter, as a result of negligence, withdrew funds
4 that should have remained in his trust account and failed to maintain accurate trust
5 account records. Just as in *Lancaster*, the mitigating factors in the instant case
6 outnumber the aggravating factors.

7
8 In *Matter of West*, SB-02-0143-D (2002), attorney David West failed to
9 keep disputed funds in his trust account until the dispute was resolved. On ten
10 occasions in three non-consecutive months, the balance in West's trust account fell
11 below the disputed amount. West, however, would have testified that he
12 instructed his secretary to keep the disputed funds in his trust account at all times.
13 In *West*, there were two ABA aggravating factors (prior discipline and substantial
14 experience in the practice of law) and four ABA mitigating factors.

15
16 Although West instructed a member of his staff to ensure that he maintained
17 a trust account balance that adequately protected all clients, he had the same
18 responsibility to protect his clients that respondent had in the instant matter (i.e.,
19 maintain proper trust account records and review them to assure that all clients'
20 funds are protected). Despite the differences between West's conduct and
21 respondent's conduct, a censure and probation are appropriate in this case.
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1 The Supreme Court has also imposed a censure in a case where a lawyer
2 failed to maintain adequate trust account records, issued trust account checks
3 against funds that had not yet been transferred into his account, failed to deposit
4 client funds intact into his trust account, failed to always use pre-numbered checks
5 to make withdrawals from his trust account, failed to reconcile his trust account on
6 a monthly basis, and deposited earned funds into his trust account. *Matter of*
7 *Randall*, SB-02-0146-D (2002). There were five ABA mitigating factors one
8 ABA aggravating factor present in *Randall*.
9
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11 Respondent's conduct was similar to that which Randall engaged in and he
12 should, therefore, receive the same sanction that Randall received.
13

14 Attorney Russell Zarkou was suspended for thirty days, in part for
15 depositing client funds into his general operating account, rather than his client
16 trust fund, and allowing the balance in his trust account to drop below that
17 required by the Supreme Court rules and the Trust Account Guidelines. *Matter of*
18 *Zarkou*, SB-02-0059-D (2002). Zarkou also failed to promptly remit funds to his
19 client and failed to maintain proper trust account records. The Disciplinary
20 Commission found that Zarkou's conduct amounted to conversion and
21 misappropriation of client funds for a period of five months. The Commission
22 found one aggravating factor and two mitigating factors present.
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1 In the instant case, respondent converted client funds on a number of
2 occasions in varying amounts. Although Zarkou failed to cooperate completely
3 with the State Bar during the disciplinary proceedings, respondent herein has
4 cooperated fully with the State Bar. Another factor distinguishing the instant case
5 from *Zarkou* is the fact that Zarkou failed to submit a timely disclosure statement,
6 failed to timely answer non-uniform interrogatories, and failed to submit proposed
7 findings of fact and conclusions of law as requested by the hearing officer.
8
9

10 Although respondent in the instant matter has two prior informal reprimands,
11 they should be given very little or no weight because they were not based on
12 conduct related to respondent's handling of his trust account and they are remote
13 in time from the misconduct in the instant case. In the instant case, there are
14 numerous mitigating factors present (both ABA factors and non-ABA factors),
15 whereas the Commission found only two mitigating factors in *Zarkou*. Based
16 upon respondent's cooperation in these disciplinary proceedings and the greater
17 number of mitigating factors present in the instant case, a censure, rather than a
18 30-day suspension, is appropriate.
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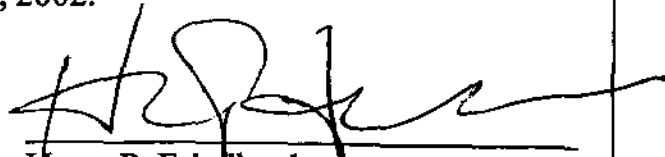
21 *See also Matter of Odneal*, SB-01-0108-D (2001) (negligent conduct, some
22 of which pertained to Odneal's failure to promptly return unearned trust funds to
23 two clients, resulted in imposition of censure and one year of probation).
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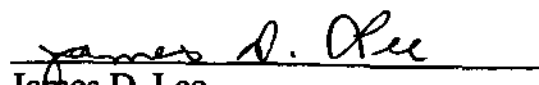
The Court and the Disciplinary Commission have repeatedly stated that the purpose of lawyer discipline is not to punish the offender but to protect the public, the profession, and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1988). The imposition of a censure, one (1) year of probation, and payment of the costs and expenses of the disciplinary proceedings will accomplish those goals. There was no actual harm to any client and the Arizona Supreme Court disfavors suspensions of less than six months. See *In re Alcorn*, SB-01-0075-D (2002) (citing and quoting the A.B.A. *Standards for Imposing Lawyer Sanctions*), and thirty-day suspensions are often disruptive and costly to the lawyer's clients. Probation with the terms set forth above will protect the public and ensure future compliance by respondent.

For all of the above reasons, respondent and the State Bar respectfully request the Disciplinary Commission to accept this Agreement for Discipline by Consent.

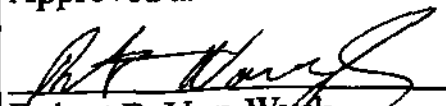
1 DATED this 27 day of December, 2002.

2
3 
4 Harry P. Friedlander
5 Respondent

6 DATED this 27th day of December, 2002.

7
8 
9 James D. Lee
10 Senior Bar Counsel

11
12 Approved as to form and content:

13 
14 Robert B. Van Wyck
15 Chief Bar Counsel

16
17
18 Original filed with the Disciplinary Clerk
19 this 30th day of December, 2002.

20
21 Copies of the foregoing mailed
22 this 30th day of December, 2002, to:

23 Harry P. Friedlander
24 Gibson Matheson Lalliss & Friedlander
25 1837 South Mesa Drive, Suite C-100
Mesa, Arizona 85210-6219
Respondent

1 Copies of the foregoing
2 hand-delivered this 30th day of
3 December, 2002, to:

4 Lawyer Regulation Records Manager
5 State Bar of Arizona
6 111 W. Monroe, Suite 1800
7 Phoenix, Arizona 85003

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by: Maria Jener
JDL:cs